IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/03/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.705 of 1988

1. M/s.Sri Textiles
Exports Incorporated
represented by its Partner
Sri Hariprasaqd Agarwal
166-A, Podhanur Main Road
Coimbatore 641 023.
2. Hariprasad Agarval
3. Mahesh Saraf
4. Suresh Saraf
5. Geetha Devi Agarwall
6. Suresh Kumar Agarwal .. Appellants

-Vs-

M/s.State Bank of India
represented by its General
Manager
Coimbatore 641 018. .. Respondent

This appeal suit is filed under S.96 of The Code of Civil Procedure
against the judgment and decree of the learned Subordinate Judge of Coimbatore
dated 20.12.1985 in O.S.No.153 of 1984.

!For Appellants : Mr.V.Nicholas

^For Respondent : Mr.R.Sreekrishnan

:JUDGMENT

M.CHOCKALINGAM, J.
The defendants are the appellants herein.
2. This appeal is directed against the judgment of the learned
Subordinate Judge, Coimbatore decreeing the suit filed by the respondent/
plaintiff for recovery of money and for a mortgage decree.
3. The respondent/plaintiff filed the suit for recovery of a sum of
Rs.1,93,056.55 with subsequent interest at 21.5% and for a mortgage decree
with the following averments:
The first defendant availed a loan facility from the plaintiff Bank as

per DD No.964 by discounting a bill drawn on M/s.C.T.M.Textiles, Ahamadabad for Rs.66,501.50 as per Lorry Receipt No.312226 dated 15.4.1982. The said bill was returned unpaid. The first defendant availed another loan facility on 15.4.82 under DD No.975 by discounting a Bill on M/s.C.T.M.Textiles, Ahamadabad for Rs.63,512.33 covered under Lorry Receipt No.312227. This bill was also returned unpaid. The account of the first defendant was debited for the bill amount together with overdue interest. Though the lorry receipt was delivered to the first defendant to enable them to arrange for the sale at Ahemadabad so that the sale proceeds can be adjusted towards the amount due, the defendants have not handed over the sale proceeds. On several occasions the defendants contacted the plaintiff and requested for the return of the bills and offered to deposit the title deeds. The first defendant gave a letter dated 4.6.1982 in that regard. On 4.9.1982, the first defendant has executed necessary loan papers. The defendants 5 and 6 stood as guarantors for over draft limit of Rs.1.60 lakhs. The defendants 2, 5 and 6 also deposited their title deeds with intent to create an equitable mortgage. The defendants 5 and 6 are also jointly and severally liable for the suit claim. An agreement was executed by the defendants on 4.9.1982. The first defendant has executed a promissory note in favour of the defendants 2, 5 and 6 for Rs.1,60,000/-, and the defendants 5 and 6 have endorsed the promissory note in favour of the plaintiff. The plaintiff issued a notice on 10.12.1982. The defendants sent a reply dated 22.12.1982. The plaintiff is entitled to proceed against the immovable properties also. The first defendant issued a notice dated 29.12.1983. A reply was sent by the plaintiff on 17.1.1984. Since the defendants did not make the payment due, the plaintiff was constrained to file the suit.

4. In the written statement filed by the fourth defendant and adopted by the defendants, 1, 2, 3, 5 and 6, it is averred as follows:

The first defendant is a partnership firm. It had an agreement with the plaintiff Bank for discounting the bills. Pursuant to the dishonour of bills, the Bank had obtained signatures of the defendants in various documents. The bills were given for the purpose of discounting only. The allegation in the plaint that the bills were given for hypothecation is incorrect. Some of the bills were dishonoured. The plaintiff entered into an agreement with the defendants and agreed to provide overdraft facility. The overdraft facility was for adjusting the sum due by bill discounting from out of the overdraft account. The alleged mortgage is false. There was no deed of equitable mortgage. The alleged mortgage deed cannot be valid, since it is not a registered one. The plaintiff had appropriated and adjusted the sum due by bills discounting from out of the overdraft arrangement. There was no sum due by discounting the bills. When the defendants demanded the return of the bills for taking delivery of the goods and wanted to effect sale of the same to pay and adjust the sum due and availed under the overdraft facility, the Bank refused to part with the bills by stating that they have been hypothecated. The conduct of the plaintiff has resulted in loss to the defendants. Since the entire liability has been discharged, the suit claim has to fail. The interest claimed is usurious and cannot be sustained. Hence, the suit was to be dismissed with costs.

5. On the above pleadings, the trial Court framed the necessary issues and tried the suit. After hearing the rival submissions and scrutiny of the oral and documentary evidence, the learned Subordinate Judge granted a

decree in favour of the plaintiff. Aggrieved defendants have brought forth this appeal.

6. The plaintiff bank filed the civil action for recovery of a sum of Rs.1,93,056.55 with subsequent interest and for a direction to the defendants to pay the decree amount within the stipulated time, in default of which a direction to bring the mortgaged property for sale.

7. Admittedly, the defendants 2 to 4 are the partners of the first defendant, a registered partnership firm. The case of the plaintiff Bank was that the defendants discounted two bills for Rs.66,501.50 and Rs.63,512.33 dated 14.4.1982 and 15.4.1982 respectively relating to the supply of goods by the first defendant firm to one of its customers viz. M/s.C.T.M.Textiles, Ahamadabad; that those bills were accompanied by lorry receipts and invoices; that after discounting, the plaintiff Bank credited the amounts borne by those two bills to the Current Account of the first defendant; that the Bank forwarded the bills and documents for collection to the defendants' customer referred to above, which refused to honour them, and they were returned unpaid to the Bank, and hence, the Bank debited the amounts covered under those two bills in the current account of the firm; that even the presentation of those bills again did not bring forth any result; that since there was large amount of debit, without any overdraft limit being granted to the firm, the Bank had no option than to mark a O.D. limit of Rs.1,60,000/- in the name of the firm and called upon the first defendant to execute the necessary documents; that accordingly an agreement in respect of the O.D. limit of Rs.1,60,000/- was executed on 4.9.1982; that the appellants 2, 5 and 6 offered their personal guarantee under Ex.A8 dated 4.9.1982; that apart from that the appellants 2, 5 and 6 offered the plaint 'A' Schedule immovable property as additional security by way of equitable mortgage; that the first defendant came forward with a request to hand over the lorry receipt pertaining to one of the two consignments stating that the firm would dispose of the goods lying idle and pay the sale proceeds to the Bank in part satisfaction of the amounts due; that acceding to the request, the Bank gave the lorry receipt No.312227, but retained the lorry receipt and other papers relating to the other consignment; that after sale, instead of paying the sale proceeds, the first defendant appropriated the same; and that after issuing the pre suit notice under Ex.A10 dated 10.12.1982, the plaintiff filed the instant suit. The defendants flatly denied the execution of the equitable mortgage. The defendants also raised a plea that the plaintiff bank failed to deliver to the first defendant the lorry receipt relating to the second consignment and thereby caused loss to the defendants, which the plaintiff Bank was liable to make good, and hence, under such circumstances, the defendants were not liable for the entire amount due under the O.D. Account as claimed in the suit.

8. Arguing for the appellants, the learned Counsel would Submit that the lower Court has not considered the entire evidence adduced by both sides; that it is pertinent to note that the amounts were due because the consignee dishonoured the bills, and the plaintiff could have avoided the liability of the defendants if it would have returned the lorry receipts to the defendants so as to enable them to get back the goods, sell the same and clear off the dues; that since it was admitted by the plaintiff that the Bank had appropriated and adjusted the amount due by the bills discounting from and out of the overdraft arrangements, no amount is due towards the bills discounting, and hence, the suit is liable to be dismissed in limine; that admittedly the

defendants have taken only a sum of Rs.1,30,013.83 by discounting the two bills, and therefore, they are liable only to the said amount and that too subject to the adjustment of damages sustained by them because of the non return of lorry receipt to the defendants; that it has to be noted that there is no materials to show that the bills were hypothecated by the defendants; that the plaintiff has not established that a deed of equitable mortgage was created, and even if any mortgage is created, it is invalid in law, since it was not registered; that it is pertinent to note that the demurrage claimed claimed by the Transport company was Rs.64,042, which has occurred due to the failure to take redelivery of the goods by the defendant for want of lorry receipt; that the plaintiff alone is liable to make good the said loss; that neither the transport company nor the plaintiff Bank informed about the alleged auction of the goods under way bill No.312226; that the available evidence would clearly establish that the plaintiff has not taken any steps to mitigate the loss to the defendants; that the finding recorded by the lower Court for granting a decree with regard to the amount paid for way bill No.312226 is probably wrong both in law and on facts; that the interest claimed by the plaintiff Bank is exorbitant, usurious and highly excessive, and there is no agreement for the same; that for these reasons, the judgment and decree of the trial Court have got to be set aside and the suit be dismissed.

9. The learned Counsel appearing for the respondent would submit that only on proper reasonings, the trial Court has granted a decree in favour of the plaintiff; that the lower Court has analysed the entire evidence and came to the conclusion that the defendants are liable to answer the suit claim; that at the instance of the defendants the lorry receipt No.312227 was handed over to them, and they promised to pay the sale proceeds to the Bank, but they failed to do so; that it is pertinent to note that the plaintiff Bank has got a lien over the goods; that in the instant case, the defendant s 2, 5 and 6 have deposited the title deed relating to their property with an intention to create an equitable mortgage; that considering the transaction between the parties, it cannot be stated the interest claimed was usurious; that there is nothing infirm or illegal in the judgment of the lower Court, and hence, the same has got to be sustained and the appeal be dismissed.

10. After careful consideration of the rival submissions and scrutiny of all the materials available, the Court has to necessarily disagree with the contentions projected by the appellants' side.

11. From the submissions made by the learned Counsel for the appellants and the grounds of appeal, it would be abundantly clear that the grounds under which the judgment of the lower Court is assailed, are twofold, namely (1) The lower Court should not have granted a mortgage decree in respect of 'A' Schedule immovable property, since the defendants 2, 5 and 6 did not execute any equitable mortgage; and (2) The lower Court has not taken into consideration the loss sustained by the first defendant firm by the non return of the lorry receipt pertaining to the second consignment.

12. The specific case of the plaintiff Bank as averred in the plaint was that the defendants 2, 5 and 6 deposited their title deed namely the original sale deed dated 1.7.1974, as found under Ex.A9, with intention to create an equitable mortgage over 16 acres and 16 cents of land as collateral security for the due payment of the amounts due to the plaintiff. The plaintiff has examined its Official by name Kandasamy as P.W.1. He has

categorically deposed that the defendants created the mortgage by deposit of title deeds in order to secure the due payment of the said amount. The promissory note executed by the first defendant and the letter of guarantee by the defendants 2, 5 and 6 were marked as Exs.A7 and A8 respectively. Along with their letter dated 4.6.1982 under Ex.A6, the first defendant has enclosed the title deed vide Document No.621/74 dated 1.7.1974. D.W.1 has candidly admitted the deposit of the said title deed and has also admitted that the said document was deposited with the Bank as security for the said loan, and in default of payment, the Bank was entitled to proceed against the same. While so, the contention of the appellants' side that the title deed relating to the immovable property was given only for the purposes of safety and not as security cannot be countenanced. Thus, the Court is able to see that the three necessary essentials for the creation of an equitable mortgage viz. (i) Debt; (ii) Deposit of title deeds; and (iii) An intention that the title deeds shall be the security for the debt., are satisfied. Quite evident it is from the available evidence that in order to secure the existing debt under those two Bills, the defendants 2, 5 and 6 have deposited the title deed viz. the sale deed under Ex.A9 with intention to create an equitable mortgage. Hence, the lower Court was perfectly correct in recording a finding that an equitable mortgage was created over the plaint 'A' Schedule property by the defendants 2, 5 and 6.

13. Insofar as the second contention of the appellants' side that the conduct of the plaintiff Bank in refusing to return the lorry receipt No.312226 pertaining to the second consignment, has resulted in loss to the first defendant firm, and hence, the defendants were not liable to meet the claim of the plaintiff was without any substance, concededly two bills for Rs.66,501.50 and 63,512.33 were discounted by the plaintiff for the first defendant firm relating to the supply of goods to one of its customers viz. C.T.M.Textiles, Ahamadabad. When those bills were presented for collection, th e said customer of the first defendant refused to honour the same, and those documents were returned unpaid, and thus, the first defendant firm became liable to the plaintiff Bank. It is an admitted position that on the request of the first defendant firm, the Bank gave the lorry receipt pertaining to the second consignment on the representation that the first defendant would dispose of the goods lying at Ahamadabad and pay the sale proceeds towards the part satisfaction of the liability. Having received the lorry receipt and disposed of the said consignment, the first defendant did not make any payment in order satisfy its liability. Under such circumstances, the first defendant or its partners cannot be permitted to say that had the lorry receipt in respect of the second consignment been given, they could have sold the goods and satisfied the entire claim. If the firm had the real intention to avoid any loss that might occur, it would have paid the sale proceeds of the first consignment, but had not done so. Needless to say that the Bank had a lien over the consignments and can exercise the same till the liability was satisfied. That apart, the first defendant has not adduced any evidence as to the extent of loss occasioned or made any counter claim. For these reasons, the contention of the appellants' side as to the loss sustained by them cannot be accepted, since it was only a ruse invented for the purpose of this case. The Court is unable to see anything to interfere with the judgment and decree of the Court below. The Court is of the considered view that the appeal is devoid of merits, and is liable to be

dismissed.
14. In the result, this appeal suit is dismissed, confirming the judgment and decree of the lower Court. The parties will bear their own costs.

Index: Yes
Internet: Yes

To:
1) The Subordinate Judge
Coimbatore
2) The Record Keeper
V.R.Section
High Court
Madras
nsv/